SUPREME COURT OF THE UNITED STATES.

No. 108.

STEPHEN V. R. ABLEMAN, Plaintiff in Error,

vs.

SHERMAN M. BOOTH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Supreme Court of the State of Wisconsin, greeting:

Because in the record and proceedings, and also the rendition of the judgment of a plea which is in the said Court before you, or some of you, between Stephen V. R. Ableman, plaintiff in error, and the State of Wisconsin, on the relation of Sherman M. Booth, defendant in error, a manifest error hath happened to the great damage of the said Stephen V. R. Ableman, as by his complaint appears; We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 26th day of October, in the year of our Lord one thousand eight hundred and fifty-four, and of our independence the seventy-ninth.

[SEAL.] B. K. MILLER,
Clerk U. S. Dist. Court, Dist. of Wisconsin.

The return to the within writ appears by the schedule hereto annexed.

The return of the Supreme Court of the State of Wisconsin.

LA FAYETTE KELLOGG,
Clerk Sup. Court Wisconsin.

UNITED STATES OF AMERICA, ss:

To Sherman M. Booth, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Wisconsin, wherein Stephen V. R. Ableman is plaintiff, and the State of Wisconsin on your relation is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be

corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-third day of October, in the year of our Lord one thousand eight hundred and fifty-four, and of our independence the seventy-ninth.

EDWARD V. WHITON,
Chief Justice of the Supreme Court of the State of Wisconsin.

I hereby admit service of the within citation this 28th day of October, 1854.

S. M. BOOTH.

(*Placita.*)

Pleas before the Supreme Court of the State of Wisconsin, at a term thereof, begun and held at the capitol, in Madison, the seat of government of said State, on the third Tuesday, to wit, the 20th day of June, A. D. 1854.

Present, The HON. EDWARD V. WHITON,
Chief Justice.

The HON. ABRAM D. SMITH, and
The HON. SAMUEL CRAWFORD,
Associate Justices of said Court.

LA FAYETTE KELLOG, *Clerk.*

(*Memo.*)

Be it remembered, that heretofore, to wit: on the 12th day of June, in the year of our Lord one thousand eight hundred and fifty-four, came into the office of the Clerk of the Supreme Court of the State of Wisconsin, Stephen V. R. Ableman, Esq., Marshal of the United States for the District of Wisconsin, by J. R. Sharpstein, Esq., his attorney, and filed in the office of the said clerk his petition for a writ of *certiorari*, together with an endorsement of the allowance of the said writ, by the Hon. Abram D. Smith, Associate Justice of the said Supreme Court, and also his *precipe* for said writ of *certiorari;* which said petition, allowance, and *precipe* are in the words and figures following, to wit:—

(*Petition.*)

TO THE SUPREME COURT OF THE STATE OF WISCONSIN:

The petition of Stephen V. R. Ableman respectfully showeth that he is the Marshal of the United States for the District of Wisconsin; that on the 26th day of May, in the year of our Lord one thousand eight hundred and fifty-four, he arrested one Sherman M. Booth, by virtue of a warrant of commitment, of which the following is a true copy, to wit:—

(*Warrant.*)

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to the Marshal of the District of Wisconsin, and the Keeper of the Common Jail of Milkwaukie County, in the district aforesaid, greeting:

Whereas, Sherman M. Booth has been brought before me, a Commissioner duly appointed by the District Court of the United States for said district, under and by virtue of the several acts of Congress, charged on oath with having, on the eleventh day of March, eighteen hundred and fifty-four, at the city of Milkwaukie, in said county and district, unlawfully aided, assisted, and abetted a person named Joshua Glover, held to service or labor in the State of Missouri, under the laws thereof, and being the property of one Benammi S. Garland, and having escaped therefrom into the State of Wisconsin, to escape from the lawful custody of Charles C. Cotton, a deputy of the Marshal of the United States for the District of Wisconsin, the said Charles C. Cotton having then and there arrested and taken into custody the said Joshua Glover, by virtue of a warrant issued by the Judge of the United States for the said district, pursuant to the provisions of the act of Congress in that case made and provided, approved September 18, 1850: And whereas an examination was, in the month of March aforesaid, held before me, and I, the said Commissioner, being satisfied that an offence had been committed, as charged in said complaint, and that there was probable cause to believe the said Sherman M. Booth guilty thereof, did thereupon require the said Sherman M. Booth to recognize with sufficient sureties in the sum of two thousand dollars for his appearance before the said District Court, on the first day of the next stated term thereof, to be held on first Monday of July next, at Madison, in said district, and that he would not depart said Court without leave: And whereas, the said Sherman M. Booth did accordingly so recognize as required, and has now this day been arrested by Charles E. Wundurly, his bail or surety in such recognizance, and delivered to the Marshal of the said district, before the said Commissioner; and whereas the said bail or surety has requested me to recommit the said Sherman M. Booth *of* the said Marshal: And whereas the said Sherman M. Booth has failed again to recognize, as required by me: Now, therefore, you, the said Marshal, are hereby commanded forthwith to convey and deliver into the custody of the keeper of the said common jail the body of the said Sherman M. Booth; and you, the said keeper of the said common jail, are hereby commanded and required to receive the said Sherman M. Booth into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand, at the city of Milwaukie in said district, this 26th day of May, eighteen hundred and fifty-four.

WINFIELD SMITH,
Commissioner, &c.

That on the twenty-seventh day of the month and year last aforesaid, the said Sherman M. Booth applied to the Hon. Abram D. Smith, a Justice of the Supreme Court of this State, for a writ of *habeas corpus*, which application was in the words and figures following, to wit:—

(*Application for Writ.*)

STATE OF WISCONSIN,
Milwaukie County, ss:

Sherman M. Booth respectfully represents to the Hon. Abram D. Smith, one of the Judges of the Supreme Court of said State, that he, the said Sherman M. Booth, is restrained of his liberty by one Stephen V. R. Ableman, the Marshal of the United States for the District of Wisconsin, and that said restraint is in the city and county of Milwaukie, and that he, the said Booth, is not committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any process, judgment, or decree, or execution, prescribed in section second of chapter one hundred and twenty-four of the Revised Statutes of said State; and that the cause or pretence of said restraint is, to the best of the knowledge and belief of the said Booth, by virtue of a pretended warrant, a copy of which is hereto annexed, and for the reasons in said warrant set forth.

And the said Booth alleges that the said restraint in his liberty is illegal, for the reason that the said Act of Congress, referred to in the said warrant, approved September 18th, A. D. 1850, is unconstitutional and void.

Also, for the reason that the Congress of the United States has no constitutional power or authority to punish the offence with which said Booth is charged, and for which he is detained by said warrant; for which reason, said warrant is of no force or validity whatever.

And the said Booth further alleges as a reason for the illegality of said imprisonment, that the said Act of Congress is in violation of compact, unalterable except by common consent, contained in the Ordinance of 1787, for the Government of the Territory northwest of the Ohio River, and that, therefore, said Act is not in force in said State.

And also, the further reason that it is alleged in said warrant, and also in the complaint on which the same is founded (all of which appears by said warrant), that the said Joshua Glover was the "property" of the said Benammi S. Garland, whereas the Act of Congress under which said complaint was made, punishes, &c. in the escape of "persons held to service or labor under the laws," and not the aiding the escape of "property," for which reason said warrant is defective in substance and form.

Therefore, the said Booth prays that a writ of *habeas corpus* may be issued in his favor, directed to the said Stephen V. R. Ableman,

and commanding him to bring the said Booth before your Honor, to be dealt with according to law.

S. M. BOOTH.

Subscribed and sworn to before me, this 27th day of May, A. D. 1854.

S. S. DAGGETT,
Notary Public.

That to the said application was annexed a copy of the said warrant of commitment, above mentioned and set forth: That the said Justice thereupon allowed and issued, under his hand and seal, a writ of *habeas corpus*, which is in the words and figures following, to wit:—

(*Writ of Habeas Corpus.*)

IN THE NAME OF THE STATE OF WISCONSIN:

To Stephen V. R. Ableman:

You are hereby commanded to have the body of Sherman M. Booth, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Booth shall be called or charged, before me, Abram D. Smith, one of the Justices of the Supreme Court of the State of Wisconsin, forthwith, at my dwelling in the city of Milwaukie, to do and receive what shall then and there be considered concerning the said Sherman M. Booth; and have you then and there this writ.

Witness my hand and seal, at Milwaukie, this 27th day of May, A. D. 1854.

A. D. SMITH, [L. S.]
Ass't. Justice of the State of Wisconsin.

That the said writ was duly served on this petitioner on the said day and year last aforesaid, that this petitioner made the following return, to wit:—

(*Return to Writ.*)

To Hon. Abram D. Smith, one of the Justices of the Supreme Court of the State of Wisconsin.

I return to the annexed writ of *habeas corpus*, that I received the said Sherman M. Booth into my custody, as Marshal of the United States for the District of Winconsin, on Friday, the 26th inst., and have since held him in custody by virtue of a warrant of commitment, issued by Winfield Smith, a commissioner duly appointed by the District Court of the United States for said District, a copy of which is hereto annexed and returned, together with the body of Sherman M. Booth, which I now have here, as commanded by the said writ of *habeas corpus*.

S. V. R. ABLEMAN,
U. S. Marshal.

MILWAUKIE, *May* 27, 1854.

That a copy of said warrant of commitment was hereto annexed.

That upon the foregoing return being made, the said Sherman M. Booth filed a demurrer thereto, of which the following is a true copy, to wit:—

STATE OF WISCONSIN,
Milwaukie County, ss:

Before the Hon. A. D. Smith, Justice of the Supreme Court of said State.

In the matter of the application of Sherman M. Booth for a *habeas corpus.*

(*Demurrer.*)

And now comes the said Sherman M. Booth and demurs to the return of the said Marshal of the United States to the said writ of *habeas corpus*, and alleges that the matters and things set forth in said return are not sufficient in law to justify the said detention and imprisonment of him, the said Booth, by the said Stephen V. R. Ableman; wherefore he, the said Booth, prays to be discharged from further custody, &c.

And this petitioner further shows that on the seventh day of June instant, the said Abram D. Smith, Justice of the Supreme Court as aforesaid, upon the said petition, return, and demurrer above set forth, upon a full hearing thereof made the following order for the discharge of the said Sherman M. Booth from the custody of this petitioner, to wit:—

In the matter of the petition of Sherman M. Booth for a writ of *habeas corpus*, and to be discharged from imprisonment.

(*Discharge.*)

This matter having been heard upon the petition and return to the writ issued herein, and the return of the respondent, Stephen V. R. Ableman, thereto, and having been argued by counsel, and there appearing no sufficient cause or warrant for the detention of the said Sherman M. Booth, and no sufficient reason being shown why he should be restrained of his liberty by reason of the premises, or of anything contained in the return to the said writ of *habeas corpus*, or for any other cause, it is therefore hereby ordered that the said Sherman M. Booth be, and he is hereby discharged from the said imprisonment whereof he has complained, and that he go hence and at large without day.

A. D. SMITH,
Associate Justice of the Supreme Court of the State of Wisconsin.

(*Petition continued.*)

And your petitioner further shows that he is advised and believes

that the said discharge of the said Sherman M. Booth is wrongful, unjust and illegal, and contrary to the provisions of chapter one hundred and twenty-four of the Revised Statutes of this State, for the reasons following:—

1*st.* Because the said Justice of the Supreme Court had no authority to issue the said writ of *habeas corpus* upon the said petition of the said Sherman M. Booth.

2*d.* Because upon the said return of your petitioner to the said writ of *habeas corpus*, the jurisdiction of the said Justice of the Supreme Court in the premises was ousted.

3*d.* Because the said Sherman M. Booth was lawfully in the custody of your petitioner as Marshal of the United States for the said district of Wisconsin, and not entitled by law to be discharged therefrom by the said Justice of the Supreme Court.

4*th.* Because the said order of the said Justice of the Supreme Court is wrong and erroneous.

And your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the said Abram D. Smith, Justice of the Supreme Court, directing him to return to this Court the record and proceedings aforesaid, and all records and proceedings touching the petition, writ of *habeas corpus*, and discharge aforesaid, to be heard, reviewed and proceeded on in this Court according to law.

S. V. R. ABLEMAN.

STATE OF WISCONSIN,
Milwaukie County, ss:

Stephen V. R. Ableman, the above named petitioner, being duly sworn, doth depose and say, that he has read the foregoing petition by him subscribed, and that he knows the contents thereof, and that the facts therein stated are true.

S. V. R. ABLEMAN.

Subscribed and sworn to before me, this 9th day of June, A. D. 1854.

CHARLES C. COTTON,
Notary Public Mil. Co., Wis.

(*Allowance of Writ of Certiorari.*)

I allow a writ of *certiorari* to be directed to Abram D. Smith, Justice, &c., and hereby order that said writ issue to him in and touching the matter of the within petition, returnable the first day of the next term of the Supreme Court, to wit: the 20th inst.

A. D. SMITH,
Associate Justice of the Supreme Court.

Filed June 12, 1854.

L. F. KELLOGG,
Clerk.

(*Precipe.*)

SUPREME COURT:

STEPHEN V. R. ABLEMAN, Pl'ff in Error,
vs.
STATE OF WISCONSIN *ex rel.* SHERMAN M. BOOTH, Def't in Error.

SIR: Issue a writ of *certiorari* directed to Abram D. Smith, a Justice of the Supreme Court, according to the allowance endorsed on the enclosed petition.

J. R. SHARPSTEIN,
Att'y for Pl'ff in Error.

To LA FAYETTE KELLOGG, ESQ.,
Clerk, &c.

MILWAUKIE, *June 9th*, 1854.

Filed June 12, 1854.

L. F. KELLOGG,
Clerk.

(*Memo.*)

Upon the filing of which said petition, allowance and precipe, a writ of *certiorari* issued out of and under the seal of said Court in the words and figures following, to wit:—

STATE OF WISCONSIN,
Supreme Court, ss:

The State of Wisconsin to Hon'l Abram D. Smith, Associate Justice of the Supreme Court of said State, greeting:—

(*Writ of Certiorari.*)

Whereas, we have been informed by the complaint of Stephen V. R. Ableman, Marshal of the United States for the District of Wisconsin, that certain proceedings were had before you on behalf of Sherman M. Booth, under and by virtue of the provisions of chapter one hundred and twenty-four of the Revised Statutes of the State of Wisconsin, whereby the said Sherman M. Booth was discharged from imprisonment, and from the custody of the said Stephen V. R. Ableman, Marshal as aforesaid.

And we, being willing for certain reasons to be certified of such proceedings, if any such were had before you, do command and strictly enjoin you that you do certify and return those proceedings, with all things appertaining thereto, unto our Justices of our Supreme Court of the State of Wisconsin, at Madison, the seat of government of said State, on the third Tuesday of June, instant, under your hand, as fully and amply as the same remain before you, so that our said Justices may further cause to be done thereupon

what of right and according to law ought to be done; and have you then and there this writ.

Witness the Hon. Edward V. Whiton, Chief Justice of [SEAL.] our said Court at Madison, this 12th day of June, A. D. 1854.

Attest, LA FAYETTE KELLOGG,
Clerk Sup. Court Wis.

(*Memo.*)

And afterwards, to wit: on the twentieth day of June, in the year aforesaid, the Hon. Abram D. Smith, Associate Justice of said Supreme Court, filed, in the office of the Clerk of said Court, his return to the said writ of *certiorari*, which said return is in the words and figures following, to wit:—

(*Return to Writ of Certiorari.*)

STATE OF WISCONSIN,
Milwaukie County, ss:

Sherman M. Booth respectfully represents to the Hon. Abram D. Smith, one of the Judges of the Supreme Court of said State, that he, the said Sherman M. Booth, restrained of his liberty by one Stephen V. R. Ableman, the Marshal of the United States for the District of Wisconsin, and that restraint is in the city and county of Milwaukie. That he, the said Booth, is not committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution upon such judgment or decree, or by virtue of any process, judgment, or decree, or execution, specified in section second of chapter one hundred and twenty-four of the Revised Statutes of said State; but, that the cause and pretence of said restraint is, to the best of the knowledge and belief of the said Booth, by virtue of a pretended warrant; a copy of which is hereto annexed, and for the reasons in said warrant set forth.

And the said alleges that the said restraint in his liberty is illegal, for the reason that the said Act of Congress referred to in the said warrant, approved September, A. D. 1850, is unconstitutional and void. Also for the reason that the Congress of the United States has no constitutional power or authority to punish the offence with which the said Booth is charged, and for which he is detained by said warrant; for which reasons the said warrant is of no force or validity whatsoever.

And said Booth further alleges as a reason for the illegality of said imprisonment, that the said Act of Congress is in violation of the provisions of compact, unalterable except by common consent, contained in the Ordinance of 1787, for the government of the territory northwest of the Ohio River; and that, therefore, said act is not in force in said State.

And also the further reason, that it is alleged in said warrant, and also in the complaint on which the same was founded (all of which appears by said warrant), that the said Joshua Glover was "the property" of the said Benammi S. Garland; whereas, the said Act of Congress, under which said complaint was made, punishes the aiding, &c. in the escape of "persons held to service or labor under the laws," and not in the aiding in the escape of property; for which reason said warrant is defective in substance and form.

Wherefore the said Booth prays, that a writ of *habeas corpus* may be issued in his favor, directed to the said Stephen V. R. Ableman, and commanding him to bring the said Booth before your Honor, to be dealt with according to law.

S. M. BOOTH.

Subscribed and sworn to before me, this 27th day of May, A. D. 1854.

S. S. DAGGETT,
Notary Public.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America, to the Marshal of the District of Wisconsin, and Keeper of the Common Jail of Milwaukie County, in the District aforesaid, greeting:

Whereas, Sherman M. Booth has been brought before me, a Commissioner duly appointed by the District Court of the United States for said District, under and by virtue of the several Acts of Congress, charged on oath with having, on the eleventh day of March, eighteen hundred and fifty-four, at the city of Milwaukie, in said County and District, unlawfully aided, assisted, and abetted a person named Joshua Glover, held to service or labor in the State of Missouri under the laws thereof, and being the property of one Benjamin S. Garland, and having escaped therefrom into the State of Wisconsin, to escape from the lawful custody of Charles C. Cotton, a Deputy of the Marshal of the United States for the District of Wisconsin, the said Charles C. Cotton having then and there arrested and taken into custody the said Joshua Glover, by a virtue of a warrant issued by the Judge of the United States for the said District, pursuant to the provisions of the Act of Congress in that case made and provided, approved September 18th, 1850.

And whereas, an examination was, in the month of March aforesaid, held before me, and I, the said Commissioner, being satisfied that an offence had been committed as charged in the said complaint, and that there was probable cause to believe the said Sherman M. Booth guilty thereof, did thereupon require the said Sherman M. Booth to recognize with sufficient sureties in the sum of two thousand dollars for his appearance before the said District Court, on the first day of the next stated term thereof, to be held on the first Monday

of July next, at Madison in said District, and that he would not depart the Court without leave: And whereas, the said Sherman M. Booth did accordingly so recognize as required, and has now, this day, been arrested by Charles E. Wunderly, his bail or surety in such recognizance, and delivered to the Marshal of the said District before me, the said Commissioner: And whereas, the said bail or surety has requested me to recommit the said Sherman M. Booth to the custody of the said Marshal: And whereas, the said Sherman M. Booth has failed again to recognize as so required by me: Now, therefore, you, the said Marshal, are hereby commanded forthwith to convey and deliver into the custody of the Keeper of the said common jail, the body of the Sherman M. Booth; and you, the Keeper of the said common jail, are hereby commanded and required to receive the said Sherman M. Booth into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand at the city of Milwaukie, in said District, this twenty-sixth day of May, eighteen hundred and fifty-four.

WINFIELD SMITH,
Commissioner, &c.

In the name of the State of Wisconsin, to Stephen V. R. Ableman:

You are hereby commanded to have the body of Sherman M. Booth, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Booth shall be called or charged, before me, Abraham D. Smith, one of the Justices of the Supreme Court of the State of Wisconsin, forthwith, at my dwelling in the city of Milwaukie, to do and receive what shall then and there be considered concerning the said Sherman M. Booth; and have you then and there this writ.

Witness my hand and seal at Milwaukie, this 27th day of May, A. D. 1854.

A. D. SMITH, [L. S.]
Asso't Justice of the Supreme Court of the State of Wisconsin.

Endorsed:

"I certify that the within writ has been allowed by me, this 27th day of May, A. D. 1854.

A. D. SMITH,
Justice of Supreme Court of Wisconsin.

To Hon. Abram D. Smith, one of the Justices of the Supreme Court of the State of Wisconsin.

I return to the annexed writ of *habeas corpus*, that I received the said Sherman M. Booth into my custody as Marshal of the United States for the District of Wisconsin, on Friday the 26th inst., and have since held him in custody by virtue of a warrant of commit-

ment issued by Winfield Smith, a Commissioner duly appointed by the District Court of the United States for said District, a copy of which is hereunto annexed and returned, together with the body of the said Sherman M. Booth, which I now have here, as commanded by the said writ of *habeas corpus.*

MILWAUKIE, *May 27th*, 1854.

S. V. R. ABLEMAN,
U. S. Marshal.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America, to the Marshal of the District of Wisconsin, and the Keeper of the Common Jail of Milwaukie County, in the District aforesaid, greeting:

Whereas, Sherman M. Booth has been brought before me, a Commissioner duly appointed by the District Court of the United States for said district, under and by virtue of the several Acts of Congress, charged on oath with having, on the eleventh day of March, eighteen hundred and fifty-four, at the city of Milwaukie, in said county and district, unlawfully aided, assisted, and abetted a person named Joshua Glover, held at service or labor in the State of Missouri, under the laws thereof, and being the property of one Bennami S. Garland, and having escaped therefrom into the State of Wisconsin, to escape from the lawful custody of Charles C. Cotton, a deputy of the Marshal of the United States for the District of Wisconsin; the said Charles C. Cotton having then and there arrested and taken into custody the said Joshua Glover, by virtue of a warrant issued by the Judge of the United States for said district, pursuant to the provisions of the Act of Congress in that case made and provided, approved September 18th, 1850: And whereas, an examination was in the month of March, held before me; and I, the said Commissioner, being satisfied that an offence had been committed as charged in said complaint, and that there was probable cause to believe the said Sherman M. Booth guilty thereof, did thereupon require the said Sherman M. Booth to recognize with good and sufficient sureties in the sum of two thousand dollars, for his appearance before the said District Court, on the first day of the next stated term thereof, to be held on the first Monday of July next, at Madison, in said district, and that he would not depart said Court without leave: And whereas, the said Sherman M. Booth did accordingly so recognize as required, and has now this day been arrested by Charles E. Wunderly, his bail or surety in such recognizance, and delivered to the Marshal of the said District, before me, the said Commissioner: And whereas, the said bail or surety has requested me to recommit the said Sherman M. Booth to the custody of the said Marshal: And whereas, the said Sherman M. Booth has failed again to recognize as required by me: Now, therefore, you, the said Marshal, are

hereby commanded forthwith to convey and deliver into the custody of the keeper of the said common jail, the body of the said Sherman M. Booth, and you, the said keeper of the said common jail, are hereby commanded to receive the said Sherman M. Booth into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand at the city of Milwaukie, in said district, this twenty-sixth day of May, eighteen hundred and fifty-four.

WINFIELD SMITH,
Commissioner, &c.

STATE OF WISCONSIN,
Milwaukie County, ss:

Before the Hon. A. D. Smith, Justice of the Supreme Court of said State.

In the matter of the application of Sherman M. Booth for a *habeas corpus.*

And now comes the said Sherman M. Booth and demurs to the return of the said Mashal of the United States to the said writ of *habeas corpus*, and alleges that the matters and things set forth in said return are not sufficient in law to justify the said detention and imprisonment of him, the said Booth; whereupon the said Booth prays to be discharged from further custody, &c.

B. PAYNE,
Att'y for Petitioner.

In the matter of the petition of Sherman M. Booth, for a writ of *habeas corpus*, and to be discharged from imprisonment.

This matter having been heard upon for the writ of *habeas corpus* issued herein, and the return of the respondent, Stephen V. R. Ableman thereto, and having been argued by counsel, and there appearing no sufficient cause or warrant for the detention of the said Sherman M. Booth, and no sufficient cause being shown why he should be restrained of his liberty by reason of the premises, or of anything contained in the return to the said writ of *habeas corpus*, or for any other cause, it is therefore hereby ordered, that the said Sherman M. Booth be and he hereby is discharged from the said imprisonment whereof he has complained, and that he go hence and at large without day.

A. D. SMITH,
Associate Justice of the Supreme Court of the State of Wisconsin.

Dated at Milwaukie, June 7th, A. D. 1854.

TO THE HON. THE SUPREME COURT
of the State of Wisconsin:

I, the undersigned, to whom the foregoing and annexed writ of *certiorari* is directed, do thereof make return, and do certify, that

on the 27th day of May, A. D. 1854, upon the petition hereto annexed, I issued the writ of *habeas corpus* herein set forth; that the petition, the writ of *habeas corpus*, the return thereto, the demurrer to the return, and the order of discharge made thereon, are all herein set forth, and copies thereof truly annexed hereto.

I further certify, that on the return of the writ on the 27th day of May, 1854, I ordered the District Attorney of the United States, J. R. Sharpstein, Esq., to be notified of the proceedings; that on the same day, the said Sharpstein appeared on behalf of the respondent, and the demurrer of the petitioner to the return to the writ was filed; that by the agreement of the parties, the hearing was set down for Monday, the 29th of May aforesaid; that on the said 29th day of May aforesaid, and before the argument had commenced, Mr. Sharpstein, as counsel for the respondent, moved to quash the writ and proceedings on the ground that a *Justice* of the Supreme Court of Wisconsin has no right or authority to issue a writ of *habeas corpus* in vacation, but that, under the present organization, such writ can only be issued by the Court in term.

Which said motion, having been argued by counsel, was overruled.

Whereupon the hearing commenced, and continued from day to day until and during the 31st day of May aforesaid; that then, not being sufficiently advised of and concerning the proper order to be made therein, the matter was continued until the 7th day of June, A. D. 1854, when, all the parties being present before me, I made the order of discharge hereinbefore set forth. And I further certify, that the above and foregoing are a true copy the proceeding had by and before me in the matter aforesaid, and of the whole of said proceedings.

A. D. SMITH,
Associate Justice of the Supreme Court of Wisconsin.

(*Memo.*)

And afterwards, to wit: at the June term of said Supreme Court, on the ninth day of the term, the same being the 28th day of June, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

STEPHEN V. R. ABLEMAN, Pl'ff in Error,
vs.
SHERMAN M. BOOTH, Petitioner &c., Def't in Error.

Certiorari to Hon. A. D. Smith, Associate Justice Sup. Court.

And now, at this day, came the parties herein by their attorneys, and the argument of this cause having been commenced by J. R. Sharpstein and E. G. Ryan, Esqr's, for said plaintiff in error, and Byron Paine and Charles Watkins, Esqrs., for said defendant in error,

and there not being now sufficient time to complete the same, this cause is continued for further argument.

(*Memo.*)

And afterwards, to wit: on the tenth day of the term aforesaid, it being the 29th day of June, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

And now, at this day, came the parties aforesaid, by their said attorneys, and the argument of this cause having been resumed, and there not being now sufficient time to complete the same, this cause is continued for further argument.

(*Memo.*)

And afterwards, to wit: on the eleventh day of the term aforesaid, it being the 30th day of June, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

And now, at this day, came the parties aforesaid, by their said attorneys, and the argument of this cause having been resumed, and there not being sufficient time to complete the same, this cause is continued for further argument.

(*Memo.*)

And afterwards, to wit: on the twelfth day of the term aforesaid, it being the sixth day of July, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

And now, at this day, came the parties aforesaid, by their said attorneys, and the argument of this cause having been resumed, and there not being now sufficient time to complete the same, this cause is continued for further argument.

(*Memo.*)

And afterwards, to wit: on the fourteenth day of the term aforesaid, it being the eighth day of July, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

And now, at this day, came the parties aforesaid, by their said attorneys, and the argument of this cause having been resumed and completed, and the cause submitted, and the Court not being now

sufficiently advised of and concerning its judgment herein, took time to consider of its opinion.

(*Memo.*)

And afterwards, to wit: on the twenty-fifth day of the term aforesaid, it being the nineteenth day of July, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Judgment.*)

The Court being now sufficiently advised of and concerning the matters and things contained in the return of the writ of *certiorari* issued herein, by an inspection of the same, and the arguments of the counsel thereon, the opinion of the Court was delivered by his Honor Chief Justice Whiton (his Honor Justice Crawford dissenting in part and placing his opinion on file).

Whereupon, it is by the Court now here considered, ordered, and adjudged that the order of the Hon. A. D. Smith in this cause, discharging the said Sherman M. Booth from imprisonment, &c., be and the same is hereby affirmed, with costs to be taxed against the said plaintiff in error.

(*Memo.*)

And afterwards, to wit: on the forty-fifth day of the term aforesaid, it being the eighth day of August, A. D. 1854, the following further proceedings were had in this cause, to wit:—

(*Record.*)

STEPHEN V. R. ABLEMAN, Marshal of the U. S. for the District of Wisconsin, Plaintiff in Error,

vs.

SHERMAN M. BOOTH, Petitioner, &c., Def't in Error.

Certiorari to Hon. A. D. Smith, Associate Justice Sup. Court.

Judgment having been rendered by this Court, at the present term thereof, in favor of the defendent in error, and against the plaintiff in error, it is ordered by the Court that the following entry in conformity with the facts in the case, be made in this cause upon the record.

Be it remembered, that in the final judgment of this cause the validity of the act of Congress of the United States, approved on the eighteenth day of September, in the year one thousand eight hundred and fifty, being chapter sixty of the first session of the thirty-first Congress, and entitled "An act to amend, and supplementary to the act entitled 'An act respecting fugitives from justice and persons escaping from the service of their masters,' approved February twelfth, one thousand seven hundred and ninety three:" and also the authority of the plaintiff in error, as Marshal of the United

States for the district of Wisconsin, to hold the relator in his custody under the process mentioned in his return to the writ of *habeas corpus* in this cause, were respectively drawn in question, and that the decision of this Court in the final judgment in this cause was against their validity respectively.

(*Certificate.*)

STATE OF WISCONSIN,
Supreme Court, ss:

I, La Fayette Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct copy of all the record and proceedings of the said Court in the above entitled cause, as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, in said State, this first day of November, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.] LA FAYETTE KELLOGG,
Clerk Supreme Court Wisconsin.

Opinion of the Court.

(*Opinion.*)

STEPHEN V. R. ABLEMAN, Pl'ff in Error,
vs.
SHERMAN M. BOOTH, Petitioner &c., Deft. in Error.

The questions presented by this record are of great importance. A citizen of this State presented a petition to a Justice of this Court, setting forth that he was unlawfully deprived of his liberty, and praying that a writ of *habeas corpus* might be issued to bring him before the said Justice, together with the cause of his imprisonment, in order that he might be liberated, if upon investigation it should be ascertained that his confinement was illegal. The writ was issued and served, and the prisoner brought before the officer; and such proceedings were then had that the prisoner was discharged. A writ of *certiorari* was issued to bring the record of these proceedings before this Court, in order to correct any error that might have been committed.

The first question which presents itself is, whether the writ of *certiorari* can properly issue from this Court in a case like the present. It is contended by the relator (Booth), that the writ ought not to have been issued, because we have no power to remand the relator back again to the custody from which he was discharged. But this, if true, would, as the matter appears to us, constitute no objection to our jurisdiction; it would only show, that if we should be of opinion that the relator was improperly discharged, we should not have the

power to give entire relief in the premises; but a simple reversal of the order of discharge by this Court, without remanding the prisoner, would enable the person from whose custody the relator was discharged to retake his prisoner. The Constitution of this State (Art. 7, sec. 3) gives this Court power to issue writs of "*habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same." We held in the case of the Attorney-General *vs.* Blossom (1st *Wis. R.* 317), that this power was not granted to the Supreme Court merely to enable it to enforce the jurisdiction conferred upon it in other parts of the Constitution, but, on the contrary, that this clause of the Constitution contained a grant of power to the Court. It follows that this Court has the power to issue any of the writs enumerated, in any case proper for their issue, and to hear and determine them.

It will hardly be contended that this is not a proper case for the exercise of this power.

A judicial decision has been had, by force of which a person has been discharged from imprisonment; and those who have an interest in having the imprisonment continued, as public officers or otherwise, and from whose custody he was discharged, have a right to the proper writ or process to bring the case before this Court for review; and the writ of *certiorari* is the proper one for that purpose. We therefore think that this objection of the relator is untenable.

The next question presented is, whether a Justice of this Court has power to issue, in vacation, a writ of *habeas corpus* and make it returnable before himself at Chambers. It is contended by the plaintiff in error (Ableman), that as this power is given by the statute (*Rev. Stat.* chapt. 124, § 3) to "*Judges* of the Supreme, Circuit, or County Courts" only, a *Justice* of this Court has no power to issue the writ. The reason given to sustain this position is, that at the time the act conferring this power was passed, there were no *Justices* of the Supreme Court; that the Constitution of the State provided for the election of Circuit Judges, and that by force of the Constitution they were to be Judges of the Supreme Court for five years, and afterwards until the Legislature should otherwise provide.

It is urged further in support of this position, that the provision in the Constitution providing for the organization of a separate Supreme Court after the expiration of five years (if the Legislature should see fit to establish one), and the organization of the present Court by virtue of this provision, show that the Justices of the Court should do no act which can come before the Court for review, it being the intention of the framers of the Constitution, and of the Legislature which passed the act regulating the manner in which the writ of *habeas corpus* is to be issued, that the present Court should not sit in review upon any decisions made by one of its members; thus avoiding what was thought to be an evil while the Supreme Court was composed of the Circuit Judges. We do not think this objection well taken. The act to provide for the organization of this Court

(*Sess. Laws*, 1852, chap. 395, sec. 4), expressly declares that the Chief Justice and Associate Justices of this Court shall be subject to all the duties and liabilities to which the Judges of the former Supreme Court were subject. Among those duties was that of granting writs of *habeas corpus* when applied for in a proper case, and we think that we should be guilty of a gross violation of duty were we to refuse them merely because the case might be reviewed before the whole Court. The Legislature has a right to impose any duty upon us as a Court, or upon the Justices who compose the Court, which is not incompatible with the Constitution, and we do not think that the term separate Supreme Court, which is applied to this Court, necessarily implies that the Justices of the Court cannot be empowered by the Legislature to do any act which may come before the whole Court.

The next question is, whether the writ ought to have been issued, it appearing from the petition of the relator, that he was imprisoned by color of legal process issued by a Commissioner of the United States for the District of Wisconsin. It is insisted by the counsel for the plaintiff in error, that in all cases the general comity of Courts which have concurrent jurisdiction, leaves the case to the Court where jurisdiction first attaches, and that such jurisdiction cannot be taken from the Court by subsequent proceedings in any other Court of concurrent jurisdiction. It is further insisted that this rule applies on higher grounds to Courts of the distinct jurisdictions of the States and the United States, and that the process and proceedings of commissioners form no exception to the rule, as they are officers of the Courts, and recognized as part of the judicial organization of the United States. We do not see how the Commissioners can properly be called officers of the Courts of the United States. It is true that they are appointed by the Judges of those Courts, but neither the Courts nor the Judges are responsible for their acts. On the contrary, their duty and power are prescribed with particularity in the acts of Congress. The Courts have no power to direct them as to the mode in which the duties imposed upon them by law shall be performed, and it seems to us to be a great misuse of language to call them officers of the Courts. Nor do we think that they can with any propriety be called judicial officers. The Constitution of the United States (Art. 3, sec. 1) provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the Supreme and inferior Courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." In the case of Martin *vs.* Hunter's Lessees (1st *Wheat. R.* 305), the Supreme Court of the United States say (after quoting this section of the Constitution): "Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to

these questions—it must be in the negative." And again, in the same case: "Congress cannot vest any portion of the judicial power of the United States, except in Courts ordained and established by itself." We therefore do not see how these Commissioners can be regarded as a part of the judicial organization of the United States; but the position assumed by the counsel for the plaintiff in error, that the Court whose jurisdiction first attaches to a case will retain it, notwithstanding that proceedings may be subsequently commenced in other Courts of concurrent jurisdiction, is, we think, indisputably correct; it is a familiar principle, and will be denied by no one. But the question arises, whether the facts stated in the petition of the relator for the writ of *habeas corpus*, show such a case.

It will not be denied that the citizens of the States naturally and properly look to their own State tribunals for relief from all kinds of illegal restraint and imprisonment. These courts are clothed with power sufficient for their protection, and would be recreant to their duty were they to refuse to exercise it upon all proper occasions. We do not think that the principle contended for by the plaintiff in error, applies to a case of this nature. The petitioner stated in his petition for the writ, that he was restrained of his liberty by reason of a pretended warrant, a copy of which is annexed to the petition. By that it appears that Winfield Smith, acting as a Commissioner of the United States, had, upon an examination of the petitioner for an alleged offence against the law of the United States, ordered the petitioner to recognize with sufficient sureties in the sum of two thousand dollars for his appearance at a term of the District Court, to be held at Madison the first Monday of July then next, and that in default of the recognizance, the Marshal was commanded to deliver the petitioner to the common jail, &c. The warrant recites that the petitioner had been charged on oath "with having on the eleventh day of March, eighteen hundred and fifty-four, at the city of Milwaukie and county of Milwaukie, in said county and district, unlawfully aided, assisted and abetted a person named Joshua Glover, held to service or labor in the State of Missouri under the laws thereof, and being the property of one Benammi S. Garland, and having escaped therefrom into the State of Wisconsin, to escape from the lawful custody of Charles C. Cotton, a deputy of the Marshal of the United States for the District of Wisconsin, the said Charles C. Cotton having then and there arrested and taken into custody the said Joshua Glover by virtue of a warrant issued by the Judge of the United States for said district, pursuant to the provisions of the act of Congress in that case made and provided, approved September 18th, 1850."

In order to show that the case is within the principle in question, it must appear that the District Court of the United States had the case pending before it, which was made by the issuing and service of the writ of *habeas corpus;* that the question of the legality of the imprisonment of the petitioner was then pending before that Court, and this the facts in this case do not show. They merely show the

ordinary case of a person imprisoned under color of legal process, for an alleged offence; in such a case, the investigation of the legality of his imprisonment does not necessarily involve an enquiry into the question of the guilt or innocence of the prisoner, nor of his liability to be held to answer for the alleged offence. Thus if the imprisonment is by virtue of a warrant issued by a State magistrate, any officer in the State authorized to issue the writ of *habeas corpus* may examine into the cause of the imprisonment, and may discharge the prisoner upon his giving bail for his appearance at the proper Court, to answer for the *offence* with which he is charged, if bail has been refused by the magistrate, and the officer who issues the writ of *habeas corpus* should be of opinion that the offence was bailable. So, if the magistrate has no authority to imprison. So, if the warrant of commitment should set forth no offence, and the commitment should be for that reason irregular, unless proof should be offered with the return to the writ to show that the prisoner was guilty of an offence (*Rev. Stat.*, chapt. 124, s. 21). In these cases, and many more which might be put, the question of the legality of the imprisonment is investigated, without ousting a Court of any jurisdiction which it has acquired. Nor do we think that the question is changed by the fact that the officer who issued the warrant by virtue of which the petitioner was imprisoned, was an officer of the United States. In many cases the State Courts and the United States Courts have concurrent jurisdiction. In some, the jurisdiction of the State Courts is exclusive, and in some that of the United States Courts is exclusive. When the jurisdiction is concurrent, the Court whose jurisdiction first attaches, will retain the case, and the other Courts will not interfere, as in no other way can a conflict between the different Courts be presented; and of course when a Court has exclusive jurisdiction, no other Court can take jurisdiction. But if the conclusions we have arrived at are correct, the jurisdiction of no Court is disturbed by issuing a writ of *habeas corpus*, and discharging a prisoner who has been committed by an inferior magistrate for refusing to procure bail for his appearance at some Court, to answer for an alleged offence, or when bail has been refused and the prisoner is held in custody.

In Sims' case (7th *Cush. R.*) the Supreme Court of Massachusetts saw no objection on this account, to issuing a writ of *habeas corpus* to bring before the Court a prisoner in the custody of a Marshal of the United States, under a warrant issued by a Commissioner of the United States, though the Court refused to issue the writ for other reasons. See also 7 *Cow. R.* 471, 10th *John. R.* 328.

It was insisted by the counsel for the plaintiff in error, that our statute (*Rev. Stat.*, chapt. 124, s. 21) interposed an insurmountable objection to the jurisdiction of a State officer in a case like the present, because it provides that the officer shall, although the commitment be irregular, remand the prisoner to custody, or hold him to bail, if it appears from testimony offered with the return, that he has been guilty of an offence. In such a case it is insisted that the

officer acts as an examining magistrate, an officer whose duties he cannot discharge, if the offence proved is one of which the Courts of the United States have exclusive jurisdiction. But we think that whatever difficulties this section of the statute may create as to the proper course to be pursued by the officer in a case of that description, it should not be construed so as to deprive a State Court or officer of the power to issue the writ in all cases where a citizen of this State is held in custody on the ground of an alleged violation of a law of the United States. The same difficulty would present itself if a State magistrate acting wholly without authority should commit a person to prison for refusing to give bail for his appearance at a Court of the United States to answer to an offence against the laws of the United States.

There being no valid objection to issuing the writ and bringing the prisoner before the officer, the question arises whether the discharge of the prisoner was in accordance with law. The return of the Marshal to the writ of *habeas corpus*, sets out substantially the same reason for the detention of the prisoner as that stated in the petition for the writ above given, so that there is no necessity for restating it. The first objection taken to the return is, that it does not set forth a valid warrant. Upon this subject we fully concur in the opinion of the Justice of this Court, who discharged the prisoner. The warrant fails to state any offence under the Act of Congress in question, inasmuch as it does not show for what purpose Joshua Glover, therein named, was in the custody of the deputy of the Marshal. He may have been in custody pursuant to the Act of Congress approved September 18th, 1850, and not have been arrested as a fugitive from labor. The warrant does not therefore state that the petitioner aided, abetted or assisted a person who was arrested as a fugitive from labor, to escape from custody. This is essential in order to constitute an offence against the Act of Congress. We are aware that it is sufficient in a warrant to state the offence without that particularity required in an indictment; but still there must be at least a general statement of the offence, in order to justify the arrest.

It is further objected to the return of the Marshal, that admitting Glover to have been arrested as a fugitive from labor, under the Act of Congress approved September 18th, 1850, still his arrest was unlawful, for the reason that the Act is repugnant to the Constitution of the United States, and therefore void. And it is contended by the relator that it can be no crime to abet or assist a person to escape from illegal imprisonment. The principal reasons urged in favor of this position of the relator are, that the Constitution of the United States confers no power upon Congress to legislate upon the subject of the surrender of fugitives from labor; that the Act in question attempts to confer judicial power upon Commissioners, and not upon Courts, and that by virtue of the Act a person may be deprived of his liberty "without due process of law." On the other hand it is contended by the plaintiff in error, that these questions are not now

open for discussion, as they have all been settled by the Supreme Court of the United States; and as that Court is the only one which has the power to settle finally the question of the constitutionality of an Act of Congress, all other Courts are bound to acquiesce in their decision. It is not, of course, claimed by the plaintiff in error, that the Act of Congress in question has been before that Court for consideration; but it is contended, that an Act passed by Congress, February 12th, 1793 (1st *U. S. Stat. at large*, 302), contains provisions not distinguishable in principle from those of the Act of September 18th, 1850, and that that Court has decided the Act to be valid and obligatory. We do not understand that the two Acts are in all respects alike in principle, or even similar. The Act of 1793 provides for the surrender of fugitives from justice and also fugitives from labor, and so far as it relates to the latter description of persons it is similar to the Act of 1850. But the two Acts differ essentially in the manner in which the surrender is to be effected. By the former, the person to whom the service or labor was due, was authorized to seize or arrest the fugitive, and to take him before any Judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest was made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit, taken and certified by a magistrate of any such State or territory, that the person so seized owed service or labor under the laws of the State to the claimant, it became the duty of the judge or magistrate to give a certificate thereof to the claimant, his agent or attorney, which was sufficient warrant for the removal of the fugitive to the State or territory from which he escaped. It will be observed that the alleged fugitive was to be taken before some Judge of the Circuit or District Court of the United States, or before some State magistrate, who decided upon the question of the surrender of the fugitive to the claimant, upon proof to be submitted to him: he had the power to weigh the testimony and to decide upon its sufficiency. The Act of September 18th, 1850, differs from that of 1793 in two essential particulars. By the former, certain officers called Commissioners, are authorized to make the surrender and give the certificate, and the testimony to show the fact that the alleged fugitive owes service or labor, and that he has escaped, is not to be weighed by the Commissioner, but has an effect given to it by the Act independent entirely of the opinion of the Commissioner in regard to its sufficiency. The 10th section of the Act provides that when any person held to service or labor in any State or territory, or in the District of Columbia, shall escape therefrom, the party to whom such labor or service shall be due, or his agent or attorney, may apply to any Court of record therein, or Judge thereof in vacation, and make satisfactory proof to such Court or Judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the Court shall cause a record to be

made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the Clerk, and of the seal of said Court, being produced in any other State, territory, or district, in which the person so escaping may be found, and being exhibited to any Judge, Commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned.

It can hardly be claimed, we think, that any adjudications upon the Act of 1793 could decide all the questions involved in the Act of 1850; but we will examine the cases referred to by the counsel for the plaintiff in error upon this point.

The Act of 1793 received a very elaborate examination in the case of Prigg *vs.* The Commonwealth of Pennsylvania (16th *Pet. R.* 640). The question, however, involved in the record befor the Court, was simply whether Prigg, the plaintiff in error, had the right to seize without process in the State of Pennsylvania, Margaret Morgan, a fugitive slave, and remove her to the State of Maryland, from which she had escaped, contrary to the statute of the former State. The decision of the Court was, that he had the power, and the Court reversed the judgment of the Supreme Court of Pennsylvania, which had affirmed the judgment of the Court in which Prigg was convicted. The principal question discussed by the Justices of the Court who gave opinions, was the power of Congress to legislate upon the subject of the reclamation of fugitives from labor, and they were all of opinion that Congress had the power; a majority of the Court holding that the power was exclusive, and that the State could not pass laws even in aid of the legislation of Congress. In the course of this discussion, nothing was said in relation to the powers of Commissioners, for those officers did not exist at the time when the Act of Congress was passed, nor of the right of the alleged fugitive to a trial by a jury to decide the questions of fact upon which his surrender depends. In the case of Jones *vs.* Van Zandt (5th *How. R.* 215), the act of 1793 came again before the Court for its consideration; and in the course of the opinion given in that case, the Court say, "This Court has already, after much deliberation, decided that the act of February 12th, 1793, was not repugnant to the Constitution. The reasons for their opinion are fully explained by Justice Story in Prigg *vs.* Pennsylvania, 16th *Peters*, 611."

In the case of Moore *vs.* Illinois (14th *How. R.* 13), the Court state what was decided in the case of Prigg against Pennsylvania, and among the questions said to be decided in that case was this, "that the Government is clothed with appropriate authority and functions to enforce the delivery [of fugitive slaves] on claim of the owner, and has properly exercised it in the Act of Congress of 12th

February, 1793." These are all the cases which we have been able to find where the act of 1793 has come before the Supreme Court of the United States for review, and in none of them is the question of the power of Commissioners to give the certificate to the claimant, which authorizes the removal of the fugitive, discussed or decided. These cases are equally silent upon the question (a most important one) raised in this case, as to the right of a person claimed as a fugitive from labor to have the facts which must be proved before he can be surrendered to the claimant tried and decided by a jury. It is true, that the act of 1793 provides for the surrender of the person claimed as a fugitive without such a trial and decision, and it is said in substance by the Supreme Court of the United States in the cases of Jones *vs.* Van Zandt, and Moore *vs.* Illinois, that the Court did decide, in the case of Prigg *vs.* Pennsylvania, that the act of 12th February, 1793, was constitutional. But upon looking at that case, we find that the question of a trial by a jury to determine the facts of the case was not raised by the record, and was not discussed by the Court in giving its opinion. We think it would be most unjust to that Court to hold that it has decided questions which its Judges have not even discussed, and which have not been before it for adjudication. We are of opinion, therefore, that whatever may be the duty of this Court, in relation of the question of the power of Congress to provide by law for the surrender of fugitives from labor to the persons to whom their labor is due, we are not at liberty to consider the question of the right of the person claimed as a fugitive to a trial by a jury before he can be surrendered or delivered up to the claimant, as already settled by the Court which has the power finally to decide all questions growing out of an alleged violation of the Constitution of the United States by an act of Congress. We must consider the question as an open one.

It becomes, therefore, our duty to decide whether so much of the Act of Congress of the 18th of September, 1850, as provides that certain officers, called Commissioners, shall decide the questions of fact which must be proved before surrender of the alleged fugitive can take place, is valid and obligatory.

We think that we are also called upon to decide whether the proceedings provided for in the act for establishing judicially the fact of the escape of the alleged fugitive, and the fact that he owes service or labor, are in conformity with the Constitution of the United States. These questions are most grave and important. We would that we could avoid them, but they are forced upon us, and we are not at liberty to refuse to consider them.

We are of opinion that so much of the Act of Congress in question as refers to the Commissioners for decision the questions of fact which are to be established by evidence before the alleged fugitive can be delivered up to the claimant, is repugnant to the Constitution of the United States and therefore void, for two reasons:

1*st*. Because it attempts to confer upon those officers judicial powers, and

2*d*. Because it is a denial of the right of the alleged fugitive to have those questions tried and decided by a jury, which we think is given him by the Constitution of the United States.

We have referred to the case of Martin *vs*. Hunter's Lessees (1st *Wheat. R.* 305), and to Art. 3, s. 1, of the Constitution of the United States, to show that Congress cannot vest any judicial power under the Constitution, except in Courts. We are aware that Congress has established Courts in the various territories, and has provided for the appointment of Judges with a different tenure of office from that fixed in the Constitution; but the power to appoint these Judges, is supposed to be derived from Art 4, s. 2, of the Constitution, which provides that "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States." But however this may be, we are not aware that the authority to vest any portion of the judicial power in any tribunals created by itself, except those mentioned in section one of Article three of the Constitution, is claimed for Congress by any one, save in the single instance of judicial officers for the territories belonging to the United States and for the District of Columbia. We think that the duties performed by the Commissioners under the Act in question, are judicial in their character, as clearly so as those performed by a Judge in the ordinary administration of justice. He is obliged to decide upon the questions presented judicially, and to give a certificate to the person claiming the alleged fugitive, which authorizes his transportation to the State from whence he is alleged to have escaped, or withhold it, as he shall think proper, in view of the evidence submitted for his consideration. It is true, that the Act by providing that the record made in the State from whence the alleged fugitive may have escaped shall be considered conclusive evidence of the escape, and of the fact that the person claimed owes service or labor to the claimant, materially lessens the labor of the Commissioner, but this does not alter the nature of the act which he performs—it must be regarded as a judicial determination of the matter submitted to him. We are, therefore, of the opinion that the Act under consideration, by attempting to vest judicial power in officers created by Congress, and unknown to the Constitution, is repugnant to that instrument, and for that reason void.

And we think it equally clear that the Constitution is violated by withholding from the person claimed, the right to a trial by a jury before he can be delivered up to the claimant.

The fifth Article of Amendments to the Constitution of the United States provides, among other things, that no person shall be "deprived of life, liberty, or property, without due process of law." Chancellor Kent, in his Commentaries (2 *Kent's Com.* 13) says, "it may be received as a self-evident proposition, universally under-

stood and acknowledged throughout this country, that no person can be taken or imprisoned, or deprived of his freehold, or liberties, or estate, or exiled, or condemned, or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers.

The words "*law of the land*," as used in *Magna Charta* in reference to this subject, are understood to mean due process of law; that is, by indictment or presentment of good and lawful men; "and this," says Lord Coke, "is the true sense and exposition of those words." We are aware that it has been said that slaves are not persons in the sense in which that term is used in the amendment to the Constitution above referred to. But this, admitting it to be true, does not affect the question under consideration, as *persons* who are free are liable to be arrested and deprived of their liberty by virtue of this act, without having had a trial by a jury of their peers. We do not propose to discuss the question whether a slave escaping from the State where he is held to service or labor into a State where slavery does not exist, thereby becomes free by virtue of the local law, subject only to be delivered up to be returned again to servitude, as it is a question not necessarily involved in the consideration of the subject before us. But we propose to examine the operation of the act upon a free citizen of a free State, and to show that by it such a person may be deprived of his liberty "without due process of law." It will be observed that the claimant can go before any Court of record, or any Judge thereof, in vacation, and make satisfactory proof to such Court, or Judge in vacation, of the escape, and that the person escaping owes service or labor to such party. It then becomes the duty of the Court to cause a record to be made of the matters so proved, and also a description of the person escaping, and such record being exhibited to any Judge, Commissioner, or other officer authorized by law to cause persons escaping from service or labor to be delivered up, shall be held and taken to be conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned.

This testimony is taken and this record is made in the absence of the person to be affected by the proceeding; he has no opportunity to cross-examine the witnesses who depose to the facts which are thus conclusively proved; but, without his knowledge, evidence is manufactured, which, by virtue of this act, proves beyond question that he is a slave, and that he has escaped from servitude. We are at a loss to perceive how this proceeding, by virtue of which a freeman becomes a slave, can be justly called "due process of law" in the sense in which that language is used in the Constitution. We are aware that it has been said that the proceedings before the Commissioner do not determine the question of freedom or slavery; that the fugitive is only sent back to the State from which he is alleged to have escaped, and that when he reaches there he is a freeman or a slave, as his *status* shall be determined by the local law.

It is further said that these proceedings are analogous to those by

which the fugitive from justice is delivered up to be taken to the State from which he has escaped. That a person may be arrested by virtue merely of an indictment found, or an affidavit made before a magistrate, charging him with treason, felony, or other crime, committed in some other State, and that upon the production of a copy of the indictment or affidavit, certified as authentic by the Governor or chief magistrate of the State or Territory from which he fled, he shall be delivered up to be taken back. It is said that as this proceeding does not deprive the person of his liberty in the sense in which that term is used in the Constitution, but merely delivers him up, to be taken to the State where, according to the indictment or affidavit, the *offence* was committed, to be dealt with according to the local law. So neither do these proceedings accomplish more than the mere transfer of the person of the alleged fugitive to the State where, as is claimed, he owes labor or service, by force of the local law. We think this a mistaken view of the question. The fugitive from justice is delivered to an agent appointed by the Governor of the State where the offence is alleged to have been committed, without any adjudication upon the question of his guilt or innocence; in other words, he is delivered to the officer of the law, and is in the custody of the law, for the purpose of being taken to the State where alone he can be tried for the alleged offence. But the case is very different with the alleged fugitive from labor.

There is an adjudication before the Commissioner that he owes service or labor, and that he has escaped. By force of the Act of Congress under consideration, the record made in the State from which he is said to have escaped, is conclusive evidence that his *status* is that of a slave.

The Commissioner is obliged, if his identity is proved, so to adjudge, and the certificate which is given to the claimant, is given because the Commissioner has so adjudged. Moreover, the Commissioner can only give the certificate to the claimant, who must be the person to whom the labor or service is due, his agent, or attorney, and it is given to him for that reason. It is not material to enquire what the condition of the person will be when he has been taken to the State where the labor or service is said to be due. He may regain his freedom, but if he does it will be by force of the law of the State, and not by virtue of the Act of Congress under consideration; for under that he has been adjudged a slave, and by force of it he has been taken as a slave by the person adjudged to be his owner, his agent, or attorney, from the State where he was arrested, to the State from which he is alleged to have escaped. We are, therefore, obliged to conclude that the alleged fugitive from labor is taken back to the State from which he is said to have escaped, not as a person merely charged with being a slave, but as a person who has been proved and adjudged to be a slave, and, as we believe, without due process of law; without having his rights passed upon and determined by a jury of his peers. We think it essential that this

right should be maintained by all Courts, and all tribunals, and for the reasons above given, we must affirm the order made in this case, discharging the relator.

(*Certificate.*)

STATE OF WISCONSIN,
Supreme Court, ss:

I, La Fayette Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct copy of the opinion of the Court in the above entitled now remaining on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, in said State, this first day of November, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.] LA FAYETTE KELLOGG,
Clerk Supreme Court, Wisconsin.

(*Bond.*)

Know all men by these presents, that we, Josiah A. Noonan and Jacob H. Kimball, are held and firmly bound unto Sherman M. Booth in the sum of five hundred dollars, to be paid to the said Sherman M. Booth, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and fifty-four.

Whereas, at the June term of the Supreme Court of the State of Wisconsin, holden at the Capitol, in Madison, in the year of our Lord one thousand eight hundred and fifty-four, on the nineteenth day of July, a final judgment was rendered and pronounced by said Court in a cause in said Court pending, wherein Stephen V. R. Ableman was plaintiff in error, and the State of Wisconsin *ex relatione* Sherman M. Booth, was defendant in error. And whereas, the said Stephen V. R. Ableman hath sued out the writ of the United States of America for the correcting of errors, and a citation directed to the said Sherman M. Booth, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at the City of Washington on the first Monday in December next, to show cause, if any there be, why the judgment aforesaid, so as aforesaid rendered, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Now, the condition of the aforegoing obligation is such, that if the said Stephen V. R. Ableman shall well and truly prosecute with effect his said writ of error, and pay to the said Sherman M. Booth, his heirs, executors, administrators, or assigns, the costs and charges ad-